



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

VIA FIRST CLASS MAIL

Trevor Potter, Esq.  
Matthew T. Sanderson, Esq.  
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One Thomas Circle, NW, Suite 1100  
Washington, DC 20005

MAR -7 2014

RE: MUR 6641  
Coalition of Americans for Political  
Equity PAC and Margaret  
Berardinelli in her official capacity  
as treasurer

Dear Messrs. Potter and Sanderson:

On September 20, 2012, the Federal Election Commission notified the Coalition of Americans for Political Equality PAC and Margaret Berardinelli in her official capacity as treasurer (collectively, "your Client"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On February 25, 2014, the Commission found, on the basis of information in the complaint, and information provided by your Client, that there is no reason to believe that the Coalition of Americans for Political Equity PAC and Margaret Berardinelli in her official capacity as treasurer violated 2 U.S.C. § 441h(b) and 11 C.F.R. § 110.16(b). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Emily M. Meyers, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

William A. Powers  
Assistant General Counsel

Enclosure:  
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENT:**    The Coalition of Americans for Political Equality PAC,            **MUR 6641**  
                         Jefferey Loyd in his official capacity as Chairman,  
                         Nicholas Spears in his official capacity as Secretary, and  
                         Margaret Berardinelli in her official capacity as Treasurer

**I.       INTRODUCTION**

         This matter was generated by a Complaint filed with the Federal Election Commission (the "Commission") by Allen West for Congress ("West"), alleging violations of the Federal Election Campaign Act of 1971, as amended, (the "Act") by The Coalition of Americans for Political Equality PAC, Jefferey Loyd in his official capacity as Chairman, Nicholas Spears in his official capacity as Secretary, and Margaret Berardinelli in her official capacity as Treasurer, (collectively, the "Respondent" or "CAPE"). The Complainant alleges that CAPE disseminated materials that reference West and direct readers, among other things, to visit a support website for West that in turn solicits donations. Yet West did not authorize that website, and little, if any, of the solicited donations were directed to West. West therefore asserts that the Respondent fraudulently misrepresented itself in solicitations and in other communications as acting on behalf of West, in violation of 2 U.S.C. § 441h(b) of the Act and 11 C.F.R. § 110.16(b).

         The record leaves little doubt that the Respondent sought to use Representative West's likeness to raise funds independently to support his candidacy. Moreover, it appears that the Respondent spent very little of the money it raised to support West. Rather, the funds appear to have been spent primarily on additional fundraising. Also troubling are the accounts of donors who mistakenly contributed funds to the Respondent while intending to contribute directly to West. Nonetheless, the Commission cannot agree with Complainant that this conduct constitutes a fraud within the reach of the Act or Commission regulation. Whether it is prohibited by laws

beyond the Act, criminal or otherwise, is not a matter within the Commission's jurisdiction. The Commission finds no reason to believe that the Respondent violated 2 U.S.C. § 441h(b) or 11 C.F.R. § 110.16(b).

## **II. FACTUAL AND LEGAL ANALYSIS**

### **A. Parties**

#### **1. Allen West for Congress**

Allen West was the U.S. Representative from Florida's 22nd Congressional District from 2011 to 2013. In a closely contested election in 2012, Allen West unsuccessfully ran for U.S. Representative in Florida's newly redistricted 18th Congressional District. Allen West for Congress is Allen West's principal campaign committee. Gregory Wilder is Treasurer.

#### **2. Coalition of Americans for Political Equality PAC**

The Coalition of Americans for Political Equality PAC registered with the Commission as an independent expenditure-only committee on February 23, 2011. Margaret Berardinelli is CAPE's Treasurer. Jefferey Loyd is CAPE's Chairman and Nicholas Spears is CAPE's Secretary. CAPE describes itself as "a non-profit political organization dedicated to restoring conservative values in the politicians elected to represent all citizens of the United States of America." Compl., Ex. A (Aug. 29, 2012).

### **B. Background**

West alleges that the Respondent's solicitations and other materials violated section 441h of the Act for three general reasons. First, West alleges that a "reasonable person could easily conclude that the language used in CAPE PAC's solicitation materials is either from Congressman West's campaign or that the solicitor is working with the West campaign."<sup>1</sup>

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<sup>1</sup> Compl. at 5.

Second, West claims that the vast majority of each Respondent's disbursements and expenditures has been for operating expenses and additional fundraising communications.<sup>2</sup> Third, West compares the actions of the Respondent to those of the respondent in MUR 5385 (Groundswell Voters PAC), a matter where the Commission found reason to believe that the respondent violated 2 U.S.C. § 441h(b) by mailing a fundraising letter requesting contributions to fund a grassroots effort to benefit Richard Gephardt's Presidential campaign.<sup>3</sup>

1. West Alleges that Respondent Violated 2 U.S.C. § 441h(b) by Referencing West in a Solicitation

West alleges that a "reasonable person could easily conclude that [the solicitation's language] indicates that the solicitation is either from Congressman West's campaign or that the solicitor is working with the West campaign" and that therefore the Respondent violated section 441h(b) of the Act and 11 C.F.R. § 110.16(b). Compl. at 4. Because the Respondent's solicitations use West's name without permission, West asserts that the Respondent is "simply using Congressman West's name to raise funds" in violation of the Act. *Id.* at 2, 4. The Complainant also alleges that the Respondent's communications "are intentionally designed to blur the line between [the Respondent's] and Allen West's own campaign committee, Allen West for Congress." *Id.* at 4.

On August 13, 2012, CAPE issued a press release entitled "CAPE PAC Is Working to Get Out the Vote in Florida." *Id.* at 1, Ex. A. The press release states that CAPE, having endorsed Congressman Allen West . . . has launched Get-out-the-vote (GOTV) campaigns focused on the Tuesday, August 14, 2012 primaries in Florida . . . . GOTV efforts include local TV advertisements, voice broadcasts, social media, search placements, and targeted videos. CAPE PAC aims to

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<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.* at 4-5.

educate voters about West . . . and to GOTV . . . . The organization is also working to help voters find their local polling places.

*Id.*, Ex. A. The press release directs readers to view its television spots on behalf of West on YouTube, “push out” the Twitter hashtag “#VoteAllenWest,” and visit CAPE’s “support” website at [www.votewest2012.org](http://www.votewest2012.org) (“Votewest2012.org”). *Id.*

Votewest2012.org includes a stylized logo “Allen West for Congress 2012” in the upper left hand corner and at the bottom left of the screen. *Id.* at 1-2, Ex. B. It also includes photos of the candidate, and descriptions of West’s positions on various issues. *Id.*, Ex. B.

Votewest2012.org also references CAPE. At the top right hand corner of the screen appears the text in small print, “A candidate support website funded by CAPE PAC.” *Id.* In the middle of the right side of the screen, under the “CONNECT WITH US” tab, the following text appears:

“Help CAPE PAC re-elect Allen West to Congress! When you sign up today, we will send you critical updates and help you stay current on the race for conservative victory in 2012.” *Id.*

A link “About CAPE PAC” is the third link in the site navigation list near the bottom of the page. *Id.* Finally, at the bottom of the page, the following text in small print appears: “Coalition of Americans for Political Equality Political Action Committee is a federal independent expenditure-only political action committee which independently supports Federal candidates who reflect our core values and principles through a variety of activities aimed at influencing the outcome of national elections.” *Id.* Below that text is a white box with the following text: “Paid for by the Coalition of Americans for Political Equality Political Action Committee / Not authorized by any candidate or candidate’s committee / For more information visit [www.capepac.org](http://www.capepac.org).” *Id.* CAPE has copyrighted the page. *Id.*

If a visitor to Votewest2012.org clicks the red “DONATE” button in the upper right corner, a new page opens that includes at the top of the page the stylized logo, “Allen West for

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1 Congress 2012” on the left and in small print on the right, “A candidate support website funded  
2 by CAPE PAC.” Compl. at 1-2, Ex. C. Near the top of the page, in a black box with white text  
3 against a white background is a banner that reads, “JOIN CAPE PAC’S CAMPAIGN TO HELP  
4 ELECT ALLEN WEST IN 2012. WITH YOUR HELP, TOGETHER, WE CAN WIN THE  
5 FUTURE FOR AMERICA!”

6 Further, CAPE states that, on its “About CAPE PAC” page, it included the following  
7 language: “PLEASE BE AWARE THAT WHEN DONATING THROUGH THIS WEBSITE,  
8 YOU ARE DONATING TO THE COALITION OF AMERICANS FOR POLITICAL  
9 EQUALITY (CAPE) PAC AND NOT DONATING TO THE CANDIDATE DIRECTLY.”

10 Resp. at 3 (Nov. 19, 2012).

11 Although the Complaint did not include screenshots from West’s own website,  
12 www.allenwestforcongress.com, the Response did. See Resp., Ex. C. Those screenshots  
13 indicate that the two websites differ in color scheme, graphic design, and layout.

14 The Complaint asserts that CAPE confused contributors to think that they are  
15 contributing to West directly. See Compl. at 3 (describing how a “political reporter/blogger[]  
16 was misled by CAPE PAC’s website . . . to believe that he was making a contribution to another  
17 candidate’s campaign directly” and asserting that “nearly 1 out of every 10 contributions made to  
18 CAPE PAC is ultimately refunded to the contributor[,]” which indicates that “these refunds are  
19 made to individuals confused by the solicitation materials of CAPE PAC”).

20 CAPE denies that its solicitations violated the Act. In its Response, CAPE asserts that  
21 Votewest2012.org “contained multiple, clear indications that CAPE PAC operates independently . . .  
22 from the West Campaign[,]” and that “CAPE PAC has also done much more than fundraise,

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1 deploying resources to promote federal candidates during the 2012 election cycle through many  
2 online and off-line efforts.” Resp. at 1.

3 The Response asserts that the legal disclaimer provided on CAPE’s website complies  
4 with the requirements of 11 C.F.R. § 110.11(c)(1)-(2), and details six other ways in which the  
5 Votewest2012.org website “went above and beyond [CAPE’s] legal obligation” to inform  
6 viewers that CAPE, not any candidate, sponsored the website. *Id.* at 2-3. The Response also  
7 states that the “logos, structure, and color scheme of CAPE PAC’s website bear no resemblance  
8 to those found on the West Campaign’s official website.” *Id.* at 3, Ex. C.

9 CAPE “recognizes that some refunds were issued to confused donors[,]” but claims that  
10 “this donor confusion was not the result of CAPE PAC’s fraudulent misrepresentations[.]” *Id.*  
11 at 3. Instead, CAPE asserts that visitors to its website, just like television and radio  
12 advertisement viewers and listeners, “may mistake an ad that discusses a candidate for one that is  
13 sponsored by a candidate[,] despite the inclusion of legal disclaimers and other indications that  
14 the ad was actually funded by an outside group.” *Id.*

15 2. Respondent Used the Majority of Funds for Operating Expenditures

16 The Complaint further alleges that CAPE violated 2 U.S.C. § 441h(b) because its  
17 “solicitations prey on civic-minded citizens who are led to believe that their contribution may  
18 actually be used in support of Allen West, and who presumably have no idea that [CAPE] simply  
19 engages in an endless cycle of fundraising that ultimately pays for little more” than the officers’  
20 own fees and benefits, and further fundraising efforts. Compl. at 4. West alleges that, according  
21 to the Respondent’s 2012 July Quarterly Reports, “[v]irtually all of the group’s reported  
22 disbursements go to operating expenditures that consist of online advertising, ‘directors fees’ to  
23 the Chairman and Secretary, and public relations[.]” Compl. at 3.

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CAPE counters the allegations regarding its operating expenditures by asserting that it engaged in legitimate political activity by: (1) buying advertisements designed to put content favorable to the candidate at or near the top of internet search result lists, which increase traffic to those sites and decrease traffic that could have gone to sites that expressed negative information; (2) creating an on-line presence via Facebook, Twitter, and YouTube; (3) sending millions of emails to targeted voters; (4) building an application for mobile phones to inform conservative voters of their polling locations; and (5) issuing numerous press releases, and sponsoring television and radio advertisements and robocalls that referenced CAPE's favored candidates. Resp. at 4.

3. Analogous Prior Commission Decision

The Complainant compares the instant matter to MUR 5385 (Groundswell Voters PAC). Compl. at 4-5. In MUR 5385, the Commission found reason to believe that the respondent violated 2 U.S.C. § 441h(b) "by mailing a fundraising letter requesting contributions to fund a grassroots effort to benefit [Richard] Gephardt's Presidential campaign." Factual & Legal Analysis at 1, MUR 5385 (Groundswell Voters PAC).

CAPE argues that MUR 5385 is distinguishable because the letter at issue in that matter did not include a disclaimer and "presented a false IRS registration number." Resp. at 1-2.

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**C. Legal Analysis**

The Act and Commission regulations prohibit persons from “fraudulently misrepresent[ing] the person as speaking, writing, or otherwise acting for on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations[.]” 2 U.S.C. § 441h(b)(1); 11 C.F.R. § 110.16(b)(1).

As the Commission has explained, section 441h(b) of the Act was enacted as part of the Bipartisan Campaign Reform Act of 2002 to prevent others from misrepresenting that they were raising funds on behalf of the candidate:

the Commission has historically been unable to take action in enforcement matters where persons unassociated with a candidate or candidate’s authorized committee have solicited funds by purporting to act on behalf of a specific candidate or political party. Candidates have complained that contributions that contributors believed were going to benefit the candidate were diverted to other purposes, harming both the candidate and contributor.

Explanation and Justification, 11 C.F.R. § 110.16, 67 Fed. Reg. 76,962, 76,969 (Dec. 13, 2002).

Since its adoption, section 441h(b) of the Act has been enforced against respondents who misled visitors to their websites by fashioning their sites to mimic the candidate’s official website, and by including on the website various statements that the websites were “paid for and authorized by” the candidate’s committee when the respondents knew that the website was neither paid for nor authorized by the candidate or the candidate’s authorized committee.

*See, e.g.,* First Gen. Counsel’s Rpt. at 3, MURs 5443, 5495, 5505 ([www.johnfkerry-2004.com](http://www.johnfkerry-2004.com)).

But “[e]ven absent an express misrepresentation, a representation is fraudulent if it was reasonably calculated to deceive persons of ordinary prudence and comprehension.” *FEC v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Tex. 2010). *Cf. United States v. Thomas*, 377 F.3d 232, 242 (2d Cir. 2004) (citing, *inter alia*, *Silverman v. United States*, 213 F.2d 405 (5th Cir. 1954) (holding that, if the mails are used in a scheme devised with the intent to defraud, the fact

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1 that there is no misrepresentation of a single existing fact makes no difference in the fraudulent  
2 nature of the scheme)). For example, in MUR 5472 (Republican Victory Committee, Inc.), the  
3 Commission found that respondents knowingly and willfully violated section 441h(b) of the Act  
4 because their telephone and mail solicitations contained statements that, although making no  
5 expressly false representation, falsely implied that respondents were affiliated with or acting on  
6 behalf of the Republican Party. *See* Commission Certification ¶ 1, MUR 5472 (Republican  
7 Victory Committee, Inc.) (Jan. 31, 2005); First Gen. Counsel's Rpt. at 8, MUR 5472 (Republican  
8 Victory Committee, Inc.). In MUR 5472, the Respondent had stated in its direct mailings:  
9 "Contributions or gifts to the *Republican Party* are not deductible as charitable contributions."  
10 First Gen. Counsel's Rpt. at 8, MUR 5472 (Republican Victory Committee, Inc.) (quoting direct  
11 mailings from Republican Victory Committee, Inc.) (emphasis added). A reasonable person  
12 reading that statement, which directly addresses the effect of the donation, would have believed  
13 that the Republican Victory Committee, Inc. was soliciting contributions on behalf of the  
14 Republican Party. *Id.*

15 The record here does not provide a reasonable basis to believe that CAPE made  
16 fraudulent misrepresentations in violation of 2 U.S.C. § 441h(b) through its press release or  
17 websites. To violate section 441h(b) of the Act, a person must fraudulently misrepresent that the  
18 person speaks, writes, or otherwise acts *on behalf of or for a candidate*. Some of the language in  
19 the Respondent's solicitations is ambiguous as to how the contributions will be spent to support  
20 West. But ultimately, despite the Respondent's attempts to use West's image and name to raise  
21 funds, the Respondent's solicitations were made expressly in each instance on behalf of CAPE,  
22 not West.

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Two main factors weigh against a finding of reason to believe that CAPE violated 2 U.S.C. § 441h(b). First, CAPE is registered with the Commission and complies with its reporting requirements, including disclosure of its expenditures and disbursements. As explained in MUR 5472, “[f]ailure to file reports with the Commission indicating on what, if anything, the money raised has been spent may be probative of the Committee’s intent to misrepresent itself to the public.” *Id.* at 12.

Second, CAPE included adequate disclaimers in its communications that indicate that CAPE—and not a federal candidate—authorized the solicitation.<sup>4</sup> The disclaimers are clear and conspicuous; and “give the reader . . . adequate notice of the identity of the person or political committee that paid for and, where required, authorized the communication.” *See* 11 C.F.R. § 110.11(c)(1). Each solicitation, further, referred to CAPE numerous times. The Commission has previously held that the presence of an adequate disclaimer identifying the person or entity that paid for and authorized a communication can defeat an inference that a respondent maintained the requisite intent to deceive for purposes of a section 441h violation. *See* MUR 2205 (Foglietta) (finding no reason to believe that respondents violated 2 U.S.C. § 441h where respondents included a disclaimer on advertising material that altered opponent’s disclosure reports and made unsubstantiated negative statements); MURs 3690, 3700 (National Republican

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<sup>4</sup> Whenever any person makes a disbursement to finance a communication that solicits any contribution through any mailing, the communication must contain a disclaimer. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a). If the communication is not authorized by a candidate, a candidate’s authorized political committee, or any agent, the disclaimer must state the name and street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate’s committee. 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(b)(3). Political committees that send more than 500 substantially similar communications by email must include disclaimers in the communications. 11 C.F.R. § 110.11(a)(1). The disclaimer must be presented in a clear and conspicuous manner to give the reader adequate notice of the identity of the person or committee that paid for and authorized the communication. *Id.* § 110.11(c)(1). Among other things, the disclaimer in printed materials must be of sufficient type size to be clearly readable, and be contained in a printed box set apart from the other content of the communication. 2 U.S.C. § 441d(c); 11 C.F.R. § 110.11(c)(2)(i)-(ii). The disclaimer need not appear on the front or cover page of the communication. 11 C.F.R. § 110.11(c)(iv).

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1 Congressional Committee) (finding no reason to believe that respondents violated 2 U.S.C.  
2 § 441h where disclaimer disclosed that respondents were responsible for the content of negative  
3 satirical postcards that appeared to be written by opposing candidate and committee). *Cf.* MUR  
4 5089 (Tuchman) (finding reason to believe a violation of section 441h occurred where disclaimer  
5 was included only on envelope of solicitation letter because letter itself appeared to come from  
6 an entity affiliated with the Democratic Party).

7 West presented some facts that would cut in favor of finding a violation—some persons  
8 appear to have been misled by CAPE to think that they were contributing directly to West's  
9 campaign—but this alone cannot support a finding that CAPE made fraudulent  
10 misrepresentations in violation of section 441h(b). CAPE employed various measures, including  
11 referencing CAPE, in addition to the Commission-required disclaimers in its communications, to  
12 make clear that CAPE was responsible for its press release and website, not West. Because the  
13 communications distributed by CAPE included the disclaimers required under Commission  
14 regulations, the Commission finds no reason to believe that CAPE violated 2 U.S.C. § 441h(b)  
15 and 11 C.F.R. § 110.16(b).

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